

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 05.11.2007

CORAM

THE HONOURABLE MR. JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MR. JUSTICE N.PAUL VASANTHAKUMAR

W.A. NO. 3865 OF 2004
AND
W.A.M.P. NO. 7298 OF 2004

The Chairman
Tuticorin Port Trust
Tuticorin.

... Appellant

- Vs -

Tuticorin Port Democratic Staff Union
(Affiliated to CITU)
rep. by its Secretary, Mr.Sampath

... Respondent

Writ appeal under Clause 15 of the Letters Patent filed against the order dated 17th June, 2004, passed by the learned single Judge in W.P. No.10907/98 the Writ Petition 10907 of 1998 presented under Article 226 of the Constitution of India to issue a Writ of Mandamus to direct the respondent to absorb the department canteen Workers port of New Tuticorin will all consequential benefits including regular pay scale and other benefits.

For Appellant : Mr. V.T.Gopalan, Addl. Solicitor General
for M/s.Anand Abdul Vinodh Associates

For Respondent : Mr. G.Masilamani, SC, for
M/s.M.Devendran

JUDGMENT

S.J.MUKHOPADHAYA, J.

This writ appeal has been preferred by Tuticorin Port Trust against order dated 17th June, 2004, in W.P. No.10807/98, whereby and whereunder, learned single Judge, while held that the employees of a canteen are part and parcel of the particular establishment of the Port Trust, allowed the writ petition and directed the appellant to absorb and regularise the permanent canteen employees of respondent canteen with consequential monetary benefits.

2. The only question that arises for determination in this appeal is whether the employees of the canteen in question have any right of absorption in the Tuticorin Port Trust.

3. For determination of the issue, it is necessary to notice certain relevant facts, as mentioned herein :-

There was a private canteen in the Tuticorin Port, which was closed. Six officers of the Tuticorin Port Trust started another canteen (canteen in question) on 21st Nov., 1973 with their personal contribution. The then Chief Engineer and administrator of the project was the patron of the canteen. A managing committee was constituted, consisting of officers of the Port. It was so opened in the interest of the workers and others. The management of the Port also helped the canteen workers by releasing certain grants. A sum of Rs.17,000/= was granted by the Port to the canteen for purchase of equipment, furniture, etc., for the tiffin room. After formal constitution of Tuticorin Port Trust (on 1st April, 1979), certain grants were released, but subsequently it was discontinued by the Port Trust. A portion of the building in which the canteen was running was of Port Trust for which a nominal charge of Rs.1/= per annum was charged, inclusive of water and electricity charges. Financial assistance of Rs.25,000/= was also granted since 1st June, 1994.

The Tuticorin Port Trust Democratic Staff Union (hereinafter referred to as 'Union') requested for absorption of the canteen workers in the Port Trust, but it was not accepted. The Chairman of the canteen management committee increased the scale, DA, HRA and medical allowance of the canteen workers w.e.f. 1st March, 1999. They were made members of the provident fund scheme and were eligible for gratuity under the Payment of Gratuity Act.

According to union, a settlement was arrived at between the management of the canteen committee and union on 6th Dec., 1994 u/s 12 of the Industrial Disputes Act. Under clause 2.5 (10), it was agreed upon to supply food at subsistence rate near the place of work. Further case of union is that the Board of Trustees of Port Trust in its meeting held on 18th Aug., 1995, decided in principle to frame scheme for absorption of the canteen employees like that of Bombay Port Trust, but no action was taken thereafter.

4. In the writ petition, the union, while sought for declaration that the employees of the canteen are part and parcel of the establishment of the Port Trust, also prayed for direction on Port Trust to absorb the employees and regularise canteen employees with all consequential monetary benefits. Learned single Judge allowed the prayer giving reference to certain judgments passed by this Court and Supreme Court as mentioned hereunder :-

i) In the case of M.M.R.Khan - Vs - Union of India reported in AIR 1990 SC 937, the Supreme Court held that u/s 46 of the Factories Act, it is obligatory on the part of the Railways to run a canteen and even though the canteen may have been run by staff committee or co-operative society, the legal responsibility is of the railways. The employees of the canteen were held to be entitled to the status of railway employees.

ii) In the case of Parimal Chandra Raha - Vs - Life Insurance Corporation of India reported in 1995 (2) LLJ 339 , the Supreme Court held that canteen workers of LIC office were entitled for absorption as regular employees.

iii) In the case of Employers in relation to Management of Reserve Bank of India - Vs - Their Workmen, reported in JT 1996 (3) SC 226, the Supreme Court noticed the decision in M.M.R.Khan's case, but distinguished the case of the canteen employees of RBI, who had no right, there being no duty on the part of RBI to supervise and control the workers of the canteen.

Learned senior counsel for the union also referred to other decisions as noticed by learned single Judge, including the Supreme Court decision in Indian Overseas Bank - Vs - IOB Staff Canteen Workers Union reported in 2000 (1) LLJ 1618, where it was noticed that canteen was established by the bank and the bank was conscious of the fact that running of a canteen was essential and the bank contributed for better efficiency and service of the employees of the canteen.

5. So far as the present case is concerned, it is not in dispute that the Port Trust is not covered by the Factories Act and, thereby, it has no statutory obligation to establish any canteen u/s 46 of the Factories Act. It further appears that a suit was filed by one of the Trustees of the Port Trust in O.S. No.23/82 on the file of the Additional Sub Court, Tuticorin for a declaration that the canteen was an estate of the Central Government. Such relief was rejected at the second appellate stage in S.A. No.821/85 on the ground that the suit by trustee was not maintainable.

Another writ petition, W.P. No.5796/84 was filed by some of the employees of the canteen questioning their retrenchment, but, ultimately, they had to withdraw the writ petition after argument. These facts have not been noticed by learned single Judge.

6. Learned Addl. Solicitor General for the appellant referred to Supreme Court decision in State of Karnataka - Vs - K.S.G.D. Canteen Employees Welfare Association reported in (2006) 1 SCC 567 and submitted that the present case is covered by the aforesaid decision of the Supreme Court. We have noticed the said judgment, which was delivered by Supreme Court after judgment passed by learned single Judge.

Learned senior counsel for the respondent union referred to list of employees and submitted that 12 workmen had already retired before judgment passed by learned single Judge; many others also retired during pendency of the writ appeal. Rest of the workmen working in the canteen have already put in about 17 to 29 years of service and, thereby, requested the Court not to interfere with the order of learned single Judge, being in favour of such workmen. Referring the Supreme Court decision in Employers in relation to Management of Reserve Bank of India - Vs - Their Workmen, reported in JT 1996 (3) SC 226, learned senior counsel submitted that though it may be non-statutory canteen, but being recognised by the employer, the workmen are entitled for regularisation. He also relied on a Bench decision of this Court in V. Radhakrishnan - Vs The Registrar, Central Administrative Tribunal reported in 2007 (3) CTC 672 wherein this Court having noticed the fact that daily wage labourers were working for more than two decades, after conferring temporary status

and wages in the time scale of pay, held that they are entitled for regularisation of their services.

7. We have noticed the fact that the canteen was opened by six officers of their own fund. It was run by the managing committee of the canteen. The said managing committee was neither under the control of Tuticorin Port or Port Trust of Tuticorin. The Port Trust only allowed space at a nominal annual rent and released certain grants from time to time for the welfare of the employees of the canteen. There was no supervisory or control of the Tuticorin Port Trust over the managing committee of the canteen or its employees. Therefore, it cannot be held that the non-statutory canteen in question was recognised by the Port Trust of Tuticorin.

8. In the case of *Employers in relation to Management of Reserve Bank of India - Vs - Their Workmen (supra)*, while dealing with three categories of canteen, the Supreme Court made the following three categories :-

- a) Statutory canteen u/s 46 of the Factories Act, 1948 ;
- b) Non-statutory canteen established with prior approval and recognition of the employer ; and
- c) Non-statutory non-recognised canteen established without prior approval or recognition of the employer.

In the present case, the canteen falls under category (c), i.e., non-statutory canteen not recognised or approved prior to its establishment or thereafter. Therefore, the union cannot derive any advantage of the Supreme Court decision in *Employers in relation to Management of Reserve Bank of India - Vs - Their Workmen (supra)*.

9. In the case of *State of Karnataka - Vs - K.S.G.D. Canteen Employees Welfare Association* reported in (2006) 1 SCC 567, almost similar matter fell for consideration before the Supreme Court. The Supreme Court noticed its earlier judgments rendered in *Mishra Dhatu Nigam Ltd. ((2003) 7 SCC 488)*, *Hari Shankar Sharma ((2002) 1 SCC 337)*, *Indian Overseas Bank (2000 (1) LLJ 1618)*, *Employers in relation to Management of RBI (supra)* and other cases. While discussing the question of maintainability, the following observation was made by the Supreme Court :-

"44. The question which now arises for consideration is as to whether the High Court was justified in directing regularisation of the services of the respondents. It was evidently not. In a large number of decisions, this Court has categorically held that it is not open to a High Court to exercise its discretion under Article 226 of the Constitution either to frame a scheme by itself or to direct the State to frame a scheme for regularising the services of ad hoc employees or daily-wage employees who had not been appointed in terms of the extant service rules framed either under a statute or under the proviso to Article 309 of the Constitution. Such a scheme, even if framed by the State, would not meet the requirements of law as the executive order made under Article 162 of the Constitution cannot prevail over a statute or statutory rules framed under the proviso to Article 309 thereof. The State is obligated to make appointments only in

fulfilment of its constitutional obligation as laid down in Articles 14, 15 and 16 of the Constitution and not by way of any regularisation scheme. In our constitutional scheme, all eligible persons similarly situated must be given opportunity to apply for and receive considerations for appointments at the hands of the authorities of the State. Denial of such a claim by some officers of the State time and again had been deprecated by this Court. In any view, in our democratic polity, an authority howsoever high it may be cannot act in breach of an existing statute or the rules which hold the field."

While dealing with the question of parity of pay, the following were the observations made by the Supreme Court :-

"48. The contention that at least for the period they have worked they were entitled to the remuneration in the scale of pay as that of the government employees cannot be accepted for more than one reason. They did not hold any post. No post for the canteen was sanctioned by the State. According to the State, they were not its employees. Salary on a regular scale of pay, it is trite, is payable to an employee only when he holds a status. (See Mahendra L. Jain - (2005) 1 SCC 639)."

10. It is true that the aforesaid judgment was not before learned single Judge, but it is equally true that the facts, which requires adjudication by a Tribunal or a Court of law having jurisdiction to decide questions of fact, were not decided either by any Tribunal or court of competent jurisdiction. Merely on the basis of the averment made by the Union, learned single Judge allowed the case. In fact, on the basis of pleading, prima facie it appears that six officers in their own interest established the canteen from their own funds and there is nothing on record that any prior approval was granted for establishing such canteen. In absence of any such relationship between the Port Trust and the employees of the canteen, learned single Judge ought not have given direction to regularise the services.

We, accordingly, set aside the judgment dated 17th June, 2004, passed by learned single Judge and dismiss the writ petition. The writ appeal is allowed; consequently, connected miscellaneous petition is closed, but there shall be no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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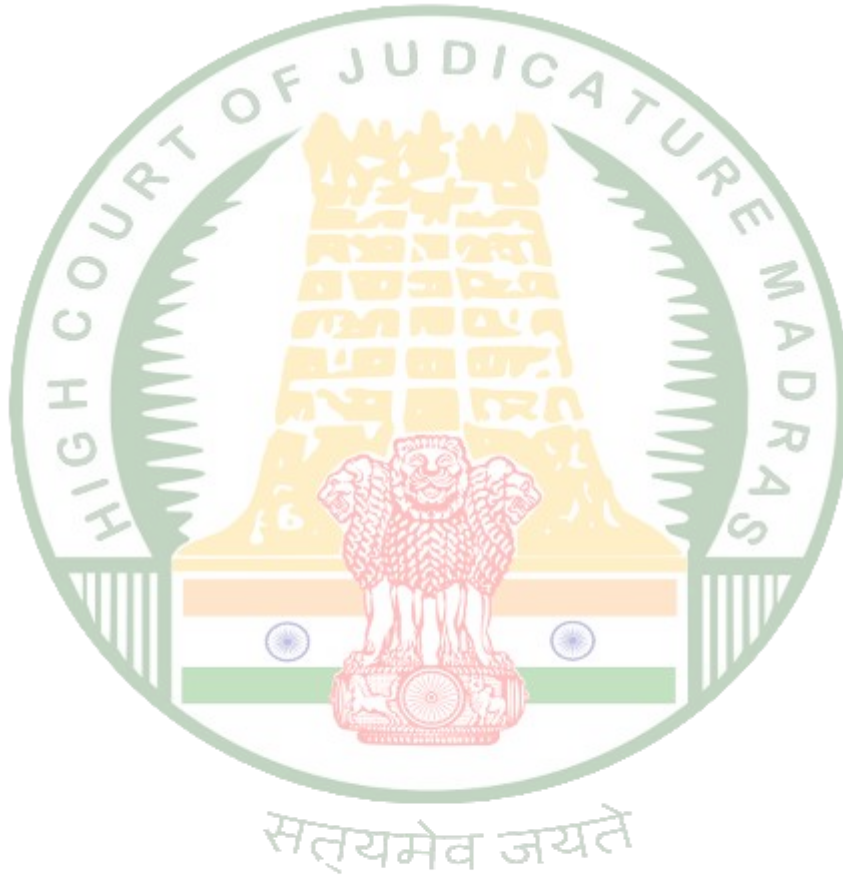
To

The Chairman
Tuticorin Port Trust
Tuticorin.

1 cc To Mr.M.Devendran, Advocate, SR.66313.

W.A. NO.3865 OF 2004

RS (CO)
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